

# STATE OF DELAWARE JUSTICE OF THE PEACE COURTS

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## **LEGAL MEMORANDUM 96 - 213**

TO:

ALL JUSTICES OF THE PEACE

FROM:

PATRICIA W. GRIFFIN

**CHIEF MAGISTRATE** 

DATE:

**FEBRUARY 27, 1996** 

RE:

ASSAULT III AND POSSESSION OF DEADLY WEAPONS BY

PERSONS PROHIBITED

# **ISSUE**

Whether a Justice of the Peace should inform defendants, upon conviction of Assault III (11 Del. C. § 611), that, in the future, possession of a deadly weapon by them will constitute a felony (11 Del. C. § 1448(a)(1)? This issue raises two separate questions for discussion: First, whether a defendant who pleads guilty or is convicted after trial of 11 Del. C. § 611 commits a violation of 11 Del. C. § 1448(a)(1) if he or she later possesses a deadly weapon. Second, whether Justices of the Peace have a duty to warn defendants convicted of § 611 of the consequences of subsequently possessing a deadly weapon (firearm).

# **SHORT ANSWER**

There is a substantial likelihood that (assuming factual evidence is presented and proven) a person convicted of 11 *Del. C.* § 611 is committing a felony under 11 *Del. C.* § 1448, should they subsequently possess a weapon. However, there

is no obligation on the part of the Justice of the Peace to warn a defendant of the consequences of subsequently possessing weapon when taking the defendant's guilty plea to a violation of 11 Del. C. § 611.

#### **DISCUSSION**

# Question #1:

Is one who pleads guilty to 11 *Del. C.* § 611; and who later possesses a deadly weapon guilty of a *per se* violation of 11 *Del. C.* § 1448(a)(1)? Section 1448 provides:

(a) Except as otherwise provided herein, the following persons are prohibited from purchasing, owning, possessing or controlling a deadly weapon within the state: (1) Any person having been convicted in this state or elsewhere of a felony or a crime of violence involving physical injury to another, whether or not armed with or having a possession of any weapon during the commission of such felony or crime of violence; . . . .

Therefore, the elements of this felony are two: (1) ownership or control of a deadly weapon; and (2) previous conviction for a felony or crime of violence involving physical injury to another. Assuming the first element is satisfied, the question is whether someone who is convicted of Assault III has necessarily been convicted of a "crime of violence" involving "physical injury to another".

Section 611 of Title 11 of the Delaware Code provides that:

A person is guilty of assault in the 3rd degree when: (1) The person intentionally or recklessly causes physical injury to another person; or (2) With criminal negligence if the person causes physical injury to another person by means of a deadly weapon or dangerous instrument.

Thus, a conviction of Assault III necessarily involves physical injury. The question is therefore narrowed to whether a conviction for Assault III evidences a "crime of violence" as described in 11 Del. C. § 1448(a)(1). The predecessor statute to Section 1448(a)(1) was challenged on vagueness grounds in *State*  $\nu$ .

Robinson, Del. Supr., 251 A.2d 552 (1969). The Robinson court found that the term "crime of violence" is not unconstitutionally vague. The phrase has a "common and ordinary meeting"; it means "any misdemeanor involving violence and bodily injury to another." Id., page 555. While the court's reasoning was circular, Robinson clearly indicates that "crime of violence" is to be defined according to the common everyday usage of the term. The Robinson court went on to note that a conviction for "assault and battery", the predicate crime at issue there, did not automatically demonstrate that the defendant had committed a "crime of violence" involving physical injury. That is because assault and battery need not have involved a level of seriousness contemplated by the phrase "a crime of violence involving physical injury to another"; that is, one could be guilty of assault and battery for a simple shove. "Therefore, in order to support a conviction under § 740 [§ 1448's predecessor], it is necessary for the state to show that the particular assault and battery, relied upon as the basis for the prosecution under the act, was an act of violence involving bodily injury to another." While the Robinson court's focus was on the "injury" requirement rather than the "crime of violence" requirement it indicates that where the predicate violation does not automatically presuppose conviction for "a crime of violence involving physical injury to another", the state must prove this requirement as an element of its prosecution under § 1448.

A conviction for violation of § 611 can be had by a demonstration of one of two occurrences, either that the defendant "intentionally or recklessly causes physical injury to another", or that the Defendant "with criminal negligence . . . causes physical injury to another by means of a deadly weapon or dangerous instrument".

The first portion of the statute clearly involves a "crime of violence" in the ordinary sense, that is, causing physical injury to another intentionally or in reckless disregard of the probability of harm. It is the second portion of the statute which is problematic. The question is whether causing injury to another with a dangerous instrument unintentionally is a "crime of violence" in the common sense.

The Delaware Code defines dangerous instrument at Title 11, Section 222(5) "... any instrument, article or substance which, under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury. Criminal negligence is defined at §

231(d): "a person acts with criminal negligence with respect to an element of an offense when the person fails to perceive a risk that the element exists or will result from the conduct. The risk must be of such a nature and degree that the failure to perceive constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation." In other words, criminal negligence is gross negligence.

The case law is not helpful in this particular question. In addition, Blacks Law Dictionary defines violence as "unjust or unwarranted exercise of force, usually with the accompaniment of vehemence, outrage or fury . . . ." It defines violent offenses as "crimes characterized by extreme physical force such as murder, forcible rape, and assault and battery by means of a dangerous weapon". Blacks Law Dictionary, 6th Edition (1991).

It appears to me to be an open question whether conduct involving a dangerous instrument which is neither intentional nor reckless but which involves gross negligence and which leads to physical injury involves a "crime of violence" as that term is commonly understood. See *State v. Robinson, supra*. I note, however, that a Superior Court case exists which indicates in dicta that a guilty plea under § 611 is sufficient to serve as the predicate for § 1448(a)(1), per se. In State v. Christie, Del. Super., 655 A.2d 836 (1994), the issue was whether a guilty plea could be withdrawn on ineffective assistance of counsel grounds. defendant's argument was that his counsel failed to warn him that a collateral result of his guilty plea might be his deportation from the United States. defendant was a resident alien. In discussing the responsibility of counsel to warn clients of the consequences of a guilty plea, the court noted that it would place an impossible burden on counsel to warn of all collateral effects. In listing collateral effects of certain specific guilty pleas the court noted the following:

A person who pleads guilty to Assault in the 3rd degree commits a crime of violence involving physical injury to another person. 11 Del. C. § 611. The offense is a misdemeanor. A person convicted of such a crime, however, is thereafter forever barred from possessing a deadly weapon. If that person does so possess a deadly weapon, he or she is then chargeable with a felony. 11 Del. C. § 1448(a)(1).

State v. Christie, at 840.

A guilty plea to Assault III involves, at minimum, that the defendant performed a grossly negligent act with a dangerous instrument which resulted in physical injury to another. Following such a guilty plea, there is a substantial likelihood that the defendant is committing a felony under § 1448 should he or she subsequently own or possess a firearm or other deadly weapon.

## **Question #2:**

The second question is whether the court has responsibility to warn defendants contemplating guilty pleas to Assault III that subsequent possession of a firearm will (or could) constitute a felony offense. A guilty plea, of course, requires a waiver of constitutional rights, and Justices of the Peace, before accepting a guilty plea, must determine by direct interrogation that the defendant "understands the consequences of entering a plea of guilty, including particularly, the possibility of incarceration." *State v. Castro*, Del. Supr., 375 A.2d 444, 449 (1977).

The case of *Villa v. State*, Del. Supr., 456 A.2d 1229 (1983), involved a defendant who lost his driver's license as an "habitual offender". Among the predicate offenses was a conviction arising from a guilty plea in Justice of the Peace Court. The magistrate, in accepting the plea, had not advised the defendant that his plea could subject him to prosecution as an habitual offender. The Supreme Court considered the defendant's argument that this conviction not be counted for habitual offender purposes:

Our decision in *State v. Castro* . . . allows a magistrate to accept a guilty plea only if he is satisfied that the plea is knowingly and intelligently made. . . . [Defendant] contends that the magistrate, when accepting his guilty plea to the third traffic offense, should have informed him of the possibility of habitual offender proceedings and license revocation.

Regardless of the characterization of the proceedings and license revocation as either civil or criminal in nature, the proceedings and revocation are collateral consequences of the guilty plea. . . . Without a doubt, the defendant musts understand the consequences of pleading guilty, but this does not include informing him of collateral civil or criminal consequences of the plea. . . .

456 A.2d, at 1232 (citations omitted).

Thus, the magistrate is not under a constitutional obligation to warn of the collateral consequences of a plea to Assault III, and need not warn of the possibility of a § 1448 offense. See Christie, supra. (counsel need not warn to withstand "ineffective assistance" claim).

It is not possible for the court to uncover and warn defendant of all various collateral detriments involved in a guilty plea. In my view, it is more appropriate, although not required, for the defense attorney to attempt to discuss some of the collateral effects. Although Justices of the Peace are under no obligation to warn defendants of the impact of a conviction under § 611 on their subsequent ability to possess a weapon, I do not see any particular problem in giving such a warning to the defendant. The court should make clear that this is not the only possible collateral effect of a guilty plea.

#### PWG/crm

cc: Honorable E. Norman Veasey

Honorable Randy J. Holland

Honorable Henry duPont Ridgely

Honorable Arthur F. DiSabatino

Honorable Vincent J. Poppiti

Honorable Alfred R. Fraczkowski

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